

VOLUNTARY SERVICES

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1. Introduction

Medical treatment facility commanders and administrators faced with dwindling resources frequently look to volunteers to fill the gap. Acceptance of voluntary services by U.S. Government agencies is, however, limited to emergencies except as authorized by law.⁴ In other words, specific statutory authority must be found to take advantage of an offer of voluntary services in a non-emergency situation. Reference to the relevant statutes and, as appropriate, their implementing regulations is important in reviewing existing volunteer programs, analyzing initiatives for new programs, and resolving narrow issues. Given the basic prohibition, the statutes and regulations must be read narrowly. They also contain important provisions relative to protections and privileges for the various categories of legitimate volunteers.

2. The Basic Prohibition - 31 U.S.C. § 1342

a. The Anti-Deficiency Act was enacted in 1870 to thwart Executive Branch officials from contracting for more goods and services than could be paid for with funds authorized by Congress - "morally" obligating Congress to make additional funds available to pay for goods and services. In addition to prohibiting unauthorized expenditures, the Act provides that "an officer or employee of the United States ... may not accept voluntary services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

b. The Congressional concerns reflected in this limitation on acceptance of voluntary services are primarily fiscal. Volunteers may easily transform themselves into claimants under a theory of *quantum meruit*,⁵ insisting that funds

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⁴31 U.S.C. § 1342.

⁵An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under

allocated by Congress be made available to pay them or that additional funds be made available if there is a deficiency.⁶ In addition, volunteers are not amenable to the controls and disciplinary rules in place for civil service employees. They may also displace paid workers. Whatever the concerns, the law is clear - legal authority must be found before voluntary services can be accepted.

3. American Red Cross Volunteers - 10 U.S.C. § 2602

a. The relationship between the American Red Cross and the Army is long-standing and positive. Both the American Red Cross as an institution and its paid staffers essentially volunteer services to the Army. In addition, the American Red Cross coordinates a program for unpaid volunteers. At medical treatment facilities both paid staffers and unpaid volunteers assist health care providers and provide a range of ancillary services. These individuals are generally well trained and supervised. Regulatory guidance can be found in Army Regulation (AR) 930-5, *American National Red Cross Service Program and Army Utilization* (19 November 1969).

b. Concerns about whether Red Cross volunteers would be considered employees of the United States for purposes of acts or omissions within the scope of their volunteer duties adversely affected support for the Red Cross Volunteer program. This led to an understanding between the Department of Justice (DOJ) and the Department of Defense (DOD) that Red Cross volunteers serving under appropriate regulatory standards and guidelines will be considered as employees of the United States for purposes of the Federal Tort Claims Act (FTCA) and, as such, entitled to representation by DOJ.⁷ The requisite Army standards and guidelines were published in a February 1991 message change to AR 40-3, *Medical, Dental, and Veterinary Care*, paragraph 2-42 (15 February 1985)(Enclosed).⁸ Red Cross Volunteer programs in

those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. Black's Law Dictionary (6th ed. 1990).

⁶See, e.g., 54 Comp. Gen. 393 (1974), which required the government to settle the claim of a member of the Commission on Marijuana and Drug Abuse who withdrew his waiver of a statutory entitlement of \$100 per day while serving on the commission.

⁷Memorandum of Understanding (MOU) Between the Department of Justice and the Department of Defense, Subject: Status of Certain American Red Cross Volunteers, 20 November 1990 (Enclosed).

⁸AR 40-3 is being updated for republication in 1999. As of March 1999, DRAFT AR 40-3 did not include the language from the February 1991 message. (Telephone conversation with Connie Hubble, Technical Writer, MEDCOM Health

individual Medical Treatment Facilities should be periodically reviewed to ensure compliance with these standards and guidelines. Ensuring compliance with standards of ethical conduct is a special concern for servicing judge advocates.

4. Title 10 Volunteers - 10 U.S.C. § 1588

a. 10 U.S.C. § 1588 permits service secretaries (i.e., the Secretary of the Army) to accept:

(1) Voluntary medical services, dental services, nursing services, or other health care related services.

(2) Voluntary services to be provided for a museum or a natural resources program.

(3) Voluntary services to be provided for programs providing services to members of the armed forces and the families of such members, including the following programs:

- (a) Family support programs.
- (b) Child development and youth services programs.
- (c) Library and education programs.
- (d) Religious programs.
- (e) Housing referral programs.
- (f) Programs providing employment assistance to spouses of such members.
- (g) Other morale, welfare and recreational (MWR) programs.

b. For each of the above three categories, the Secretary of the Army has delegated authority to accept voluntary services to responsible commanders (e.g. MACOM, installation/garrison, etc.).⁹ However, the Office of the Staff Judge Advocate (OSJA), U.S. Army Medical Command (MEDCOM) has advised that, with respect to the first category, individual MTFs may not accept voluntary health care services until OTSG or MEDCOM issues implementing instructions or until policies and procedures therefor are established in applicable Army regulations.¹⁰

Policy and Services, 22 March 1999.) Note to practitioners: Upon publication of the updated version of AR 40-3, the February 1991 message language will no longer exist. Without these regulatory standards, the status of Red Cross volunteers as employees of the United States for FTCA purposes as per the DOD/DOJ MOU may again be in doubt.

⁹HQDA LTR 608-98-1, 10 April 1998 (Enclosed).

¹⁰Telephone conversation with M. Louise Attaya, OSJA MEDCOM, July 1998.

Alternatively, individuals offering such services can be directed to the Red Cross.¹¹

c. In addition to the HQDA Letter, there is other authority for the acceptance of voluntary services in the second and third categories. For example, voluntary services to be provided for a museum can be accepted under the provisions of AR 870-20, *Army Museums, Historical Artifacts, and Art*, paragraph 3-12 (26 January 1999). AR 608-1, *Army Community Service Program*, Chapter 4 (23 January 1998) includes authority for acceptance and regulatory guidance for limited forms of voluntary services under the third category of 10 U.S.C. § 1588. It includes a standard written agreement, DA Form 4712-R, and a parental permission form, DA Form 5671-R. It provides that volunteers will not perform duties for which there is an unfulfilled manpower requirement, which circumvents the civil service system, or for which funding has been provided to hire staff or obtain services by contract.

d. Generally, 10 U.S.C. § 1588 volunteers are considered as employees of the Federal Government (or a nonappropriated fund instrumentality of the United States, as appropriate), for purposes of workers compensation and claims for damages or loss as long as the services being provided are within the scope of the services so accepted. They may also be eligible for reimbursement of certain incidental expenses from appropriated or nonappropriated funds.¹² They may not serve in policy-making positions. Most installations have paid "volunteer coordinators" to coordinate the services of such volunteers, to ensure they are qualified under applicable laws and regulations to provide services, and to ensure the supervision requirement contained in the underlying statute is adhered to.

5. Student Volunteers - 5 U.S.C. § 3111

a. The student volunteer program is an agency program for students volunteering their services with the permission of an educational institution or nonprofit organization officially designated by a school or board of education to coordinate the placement of students in nonpaid work assignments. The program

¹¹Telephone conversation with COL O'Donnell, Office of the Surgeon General, 13 December 1995.

¹²AR 215-1, *Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities*, paragraph 4-11(k), (25 October 1998).

must be open to any student.¹³ Student volunteers may not displace any employees. They are considered to be employees of the United States for purposes of compensation for work-related injuries and for purposes of the FTCA.

b. AR 351-3, *Professional Education and Training Programs of the Army Medical Department*, chapter 14 (8 February 1988), requires an "affiliation agreement" with the educational institution before student volunteers can receive training in an Army MTF. The format for these agreements is outlined in the regulation. Deviations are not authorized at the MTF level; requests for deviations must be fully documented. Arrangements wherein outside institutions would provide supervisory and teaching staff within the MTF have generally been disapproved.

6. Gratuitous Services

a. The Anti-Deficiency Act prohibition against acceptance of voluntary services does not apply to acceptance of so-called "gratuitous services," although the distinction between the two is both technical and tenuous. Essentially, gratuitous services contemplate services furnished on the initiative of a private individual, rendering the same without request from or claim against the United States.¹⁴ The crux of gratuitous services is an agreement between the individual and the government providing in writing that the individual does not expect to be paid for the services rendered.

b. Although acceptance of a gratuitous service does not violate the Anti-Deficiency Act, acceptance of the service could result in an improper augmentation of agency appropriations. A gratuitous service, which would otherwise require an expenditure, frees up a like amount of money because it is performed without cost. The money not spent is viewed as the equivalent of the receipt of funding outside of Congressional control. Consequently, an agency may accept a "gratuitous" service only when either (1) there is specific statutory authority permitting such service or (2) the service is not

¹³Compare the Youth Services Career Exploration Program, an Army MWR program outlined in AR 215-2, *The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities*, chapter 8 (10 October 1990). The Career Exploration Program encompasses apprenticeships, whereby youths learn an art or trade, and internships, whereby supervised youths observe and assist in a profession. Only military family members may participate in a Career Exploration Program.

¹⁴7 Comptroller General 810 (1928).

something normally performed by the agency by its own personnel and appropriated funds.¹⁵

c. As outlined above, in paragraph 4b, the Secretary of the Army expanded Army wide the authority to accept voluntary services under 10 U.S.C. 1588. Nevertheless, many individuals who provide voluntary services for Army MWR programs (e.g. those coming under the guidance of AR 608-10, ¶3-15, 12 Feb 90,) are not "volunteers" but instead are gratuitous servants. AR 215-1, 25 Oct 98, figures 7-1 and 7-2 contain sample agreements for adults and minors who provide such gratuitous services. AR 215-1 also specifies that MWR gratuitous services may not be accepted for duties where appropriated fund compensation is fixed by law (GS positions), in lieu of filling a nonappropriated fund employee position, or for duties which if not performed would require the hiring of an appropriated or nonappropriated fund employee.

d. Gratuitous servants may not receive appropriated or nonappropriated reimbursement for their services and are not protected under worker's compensation or the Federal Tort Claims Act for incidents arising from their service. However, reimbursement of incidental expenses can occur if an activity-specific or installation-wide private organization is formed whose sole purpose is to raise money or receive donations for such reimbursement.¹⁶

e. Of likely interest to AMEDD facilities is the permissibility of accepting gratuitous medical services. While AR 40-1, ¶4-1, provides general guidance on employing civilian experts and consultants within the AMEDD, it does not discuss experts and consultants providing gratuitous services. This area is complicated. All initiatives involving requests to accept gratuitous medical services require coordination with MEDCOM.

¹⁵ Comptroller General Decision, *Matter of: Community Work Experience Program -- State General Assistance Recipients at Federal Work Sites*, B-211079.2, (1987).

¹⁶ AR 215-1, ¶ 7-40b, Morale Welfare and Recreation, 25 Oct 98.